Filed 3/1/10 P. v. Wesley CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. BRYANT S. WESLEY, Defendant and Appellant.	B209299 (Los Angeles County Super. Ct. No. VA064124)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed as modified.

Sharon Fleming, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Keith H. Borjon and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Bryant S. Wesley appeals from the denial of his motion to withdraw a no contest plea. Wesley challenges the trial court's conclusion that he was competent at the time he entered his plea. He also argues that he should be permitted to withdraw his plea because the court misadvised him regarding his eligibility for probation. We reject these arguments, modify defendant's presentence credits, and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Preliminary Hearing and Information*

At the preliminary hearing, the prosecution presented evidence that on February 28, 2001, defendant robbed at gunpoint an employee of Tacos Mexico, a restaurant. The employee gave defendant money from the cash register because she feared for her life. Defendant admitted to a police officer that he robbed Tacos Mexico and used a gun. Defendant presented no evidence at the preliminary hearing.

On March 27, 2001, defendant was charged with second degree robbery (Pen. Code, § 211).[1] It was alleged that he personally used a firearm within the meaning of sections 12022.5, subdivision (a)(1) and 12022.53, subdivision (b).

2. *Defendant's Pleas*

On March 27, 2001, defendant pled not guilty. On June 18, 2001, defendant changed his plea to no contest. At the time of the plea, deputy alternate public defender Laronda J. McCoy had represented defendant for three months. Prior to entering his plea, defendant initialed and signed a written waiver of his right to trial by jury, to confront witnesses, to testify on his own behalf, and to call witnesses. Defendant also initialed a provision stating, "My lawyer has told me that if I plead guilty to [robbery with a section 12022.53 enhancement] . . . the court will

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[1] Undesignated statutory citations are to the Penal Code.

sentence me as follows: [¶] State prison for the term prescribed by law, which term is a maximum of 15 years imprisonment in the penitentiary. I waive my right to make application for probation and request immediate sentence."

During the open plea and after conferring with Ms. McCoy, defendant indicated he understood the charges against him. Defendant acknowledged that he had discussed the written waivers, initialed the boxes, and signed the form. Ms. McCoy assisted defendant with the form and explained it to him. The prosecutor then informed defendant of his rights and asked if he intended to waive them. When the prosecutor asked defendant if he wished to plead guilty or no contest, defendant answered, "[n]o contest." Defendant stated he understood and gave up his right to a trial. Defendant confirmed that he understood and gave up his rights to confront witnesses, cross-examine witnesses, and present evidence in his defense. When asked a second time if he wished to plead no contest, defendant answered, "[n]o." Defendant then conferred with Ms. McCoy, following which defendant stated that he wished to plead no contest. Defendant conferred with Ms. McCoy again before reaffirming his desire to plead no contest.

The court found defendant knowingly and intelligently waived each of his rights and accepted the plea. Defendant admitted that he committed a second degree robbery and that he used a firearm within the meaning of section 12022.53, subdivision (b). After the plea, defense counsel requested a delayed surrender date because of defendant's medical problems, which were not further identified except by the court's statement that defendant was in a wheelchair. At no time did anyone suggest that defendant was incompetent or suffering from any mental impairment.

3. *Continuation of Sentencing and Motion to Withdraw Plea*

Sentencing was repeatedly continued because defendant was hospitalized. On November 14, 2001 -- roughly five months after defendant had entered his plea -- defendant, represented by new counsel, moved to withdraw his plea. On

November 28, 2001, the court declared a doubt as to defendant's mental competence and ordered Dr. Kuashal Sharma to examine defendant. Defendant was found incompetent a total of three times, and each time regained his competency.[2]

On April 2, 2008, the court commenced a hearing on defendant's motion to withdraw his plea. In his written motion, defendant's counsel argued that defendant's waiver of a jury trial was not knowingly and intelligently made because he was not competent at the time he waived that right. In a footnote, defense counsel stated that defendant understood "a signed plea form . . . exist[ed]," but claimed that he could "establish that [defendant] did not sign this form or understand its contents."

The motion was supported by a declaration from defendant's mother, attesting that (a) prior to February 28, 2001, defendant did not suffer from any loss of balance or memory, and (b) defendant was under heavy medication at the time the plea was taken. Defendant's friend, Byketha Sims, averred to the same facts.

In a report dated February 4, 2008, Dr. Sharma considered defendant's competency at the time he entered his plea -- some six months before Dr. Sharma met defendant. Dr. Sharma reported that from February through March of 2001, defendant had been prescribed Dilantin and according to his family, was substantially impaired at that time. (Dilantin is an antiepileptic medication which may cause confusion. (*Godinez v. Moran* (1993) 509 U.S. 389, 411, fn. 1 (dis.

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[2] Following each referral and treatment, the medical director of Patton State Hospital (Patton) wrote the court indicating that defendant was mentally competent. In one report the medical director at Patton found that defendant was malingering, but also diagnosed him with adjustment disorder, depression, seizure disorder, cerebellar degeneration, and lower extremity weakness. The report found that the cerebellar degeneration did not interfere with defendant's cognitive abilities.

opn. of Blackmun, J.).) In April 2001, defendant was taken to the hospital and found to have suffered from Dilantin toxicity with symptoms that included mental confusion. Dr. Sharma concluded that the symptoms of Dilantin toxicity continued through December 2001. Specifically, according to Dr. Sharma, "between March and December of 2001 [defendant] was profoundly mentally impaired secondary to brain pathology caused by Dilantin toxicity and was in a state of dementia which . . . prevent[ed] him from rationally and intelligently waiv[ing] his constitutional rights and enter[ing] a plea of no contest."

4. *Hearing on Defendant's Motion to Withdraw His Plea*

On April 2 and April 17, 2008, the court held a hearing on defendant's motion to withdraw his plea based on his claim that he was incompetent at the time he entered the no contest plea. Ms. McCoy testified that she had numerous conversations with defendant and never had any suspicion that he was incompetent. Defendant was able to explain the facts of the case to her and to describe his remorse for his conduct. Ms. McCoy remembered discussing with defendant the mandatory minimum sentence applicable to the gun enhancement and the consequence of a conviction that fell within the "Three Strikes" law (§§667, subds. (b)-(i), 1170.12, subds. (a)-(d)). According to Ms. McCoy, defendant had meaningful discussions with her at the time he entered his plea and throughout her representation of him.

Ms. McCoy further testified that defendant appeared to understand the proceedings when he pled guilty. She never had any concern about defendant's mental abilities and was never advised of any mental incapacity either by defendant or by his parents, who had attended all of the hearings. Ms. McCoy "actually wished" defendant had been incompetent because she was very concerned about mandatory minimum sentencing requirements.

Dr. Sharma also testified at the hearing. He first observed defendant in December 2001, approximately six months after defendant had entered his no contest plea. At that time, defendant was "almost like a dummy," and Dr. Sharma could not interact with him. Defendant did not know his own name. When Dr. Sharma saw him in December 2001, defendant was substantially impaired, as reflected by the fact that he could not take care of his personal hygiene or feed himself and required a wheelchair.

Dr. Sharma opined that in June, 2001, when defendant entered his plea, he "very likely did not understand what the case was all about, what statements he was making, and what the possible consequences might be." Dr. Sharma explained: "[T]he only reasonable inference I can draw is that if he was impaired in March 2001 and was impaired in December 2001, it would be almost [impossible] for him to be okay on June 18, 2001." Dr. Sharma based his opinion that defendant was impaired in March 2001 on jail medical records apparently indicating that defendant had suffered from Dilantin toxicity.

Dr. Sharma conceded that his opinion would be different if there were evidence that defendant had engaged in meaningful discussions with his attorney at the time he entered his plea. According to Dr. Sharma, if the attorney representing defendant had had meaningful conversations with defendant, "that itself proves that . . . [defendant was] competent. . . . If those facts are factually true . . . that clearly proves that one is competent under those circumstances to enter a plea."

Defendant's mother testified that when she bailed defendant out of jail (presumably in April 2001), she immediately took him to the hospital where he stayed for eight or nine days. According to defendant's mother, she was always present with defendant in the hallway when attorney McCoy discussed issues with defendant, and defendant appeared distraught and unable to understand what was happening.

Defendant did not testify and offered no evidence regarding his written waiver.

5. *Sentence and Appeal*

At the conclusion of the hearing on April 17, 2008, the court denied defendant's motion to withdraw his plea. The court stated defendant was presumed competent, and the burden was on the defense to show he was incompetent. The court found nothing in the plea transcript to indicate defendant did not understand what was happening or was acting involuntarily. The court considered the transcript in conjunction with the witnesses' testimony when it concluded that defendant had not carried his burden, and it denied the motion to set aside the plea for incompetency.

Defendant was sentence to 12 years in state prison. Defendant was awarded 2,386 days of credit, including 75 days of conduct credit and 2,311 actual days. Defendant filed a timely notice of appeal, and the trial court issued a certificate of probable cause.

DISCUSSION

1. *The Trial Court Correctly Denied Defendant's Motion to Withdraw His Plea*

a. *Federal and State Law Prohibit the Criminal Prosecution of a Defendant Who is Not Competent*

"It is well established that the Due Process Clause of the Fourteenth Amendment prohibits the criminal prosecution of a defendant who is not competent to stand trial." (*Medina v. California* (1992) 505 U.S. 437, 439.) "In a competency hearing, the 'emphasis is on [the defendant's] capacity to consult with counsel and to comprehend the proceedings . . . .'" (*Id.* at p. 448.) Section 1367 implements this requirement, providing: "A person cannot be tried or adjudged to punishment while that person is mentally incompetent. A defendant is mentally

incompetent for purposes of this chapter if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." (§ 1367, subd. (a).)

Section 1369 establishes a procedure for evaluating a defendant whose competence is in doubt. It mandates the court appoint a psychiatrist, licensed psychologist, or other expert to examine the defendant and determine the defendant's ability to understand the nature of the proceedings and assist counsel in a defense. (§ 1369, subd. (a).) Under section 1369, the defendant is presumed to be mentally competent.[3] (§ 1369, subd. (f) ["It shall be presumed that the defendant is mentally competent unless it is proved by a preponderance of the evidence that the defendant is mentally incompetent."]; *People v. Rells* (2000) 22 Cal.4th 860, 862 [section 1369 establishes a presumption that the defendant is mentally competent unless he is proved by a preponderance of the evidence to be otherwise].) That presumption has been upheld as constitutional as long as a defendant's burden of proof to show incompetence is by a preponderance of the evidence. (*Medina v. California*, *supra*, 505 U.S. at p. 453 [presumption that defendant is competent does not violate due process]; *People v. Rells, supra*, 22 Cal.4th at p. 870, citing *Cooper v. Oklahoma* (1996) 517 U.S. 348, 354-369

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[3] In the trial court, defense counsel acknowledged it was his burden to show defendant was incompetent at the time he pled no contest. On appeal, defendant argues the prosecutor had the burden of proving his incompetence, and the trial court erred in requiring him to prove his competence. Defendant relies on *People v. Ary*, review granted July 29, 2009, S173309, which, unlike this case, concerned a trial court's failure to order a hearing under section 1368 to determine the defendant's competency to stand trial. The Supreme Court granted review and the case is depublished. (Cal. Rules of Court, rule 8.1100(e) [case is no longer published if Supreme Court grants review of it].)

[requiring defendant to prove incompetency by clear and convincing evidence violates due process].)

A trial court's duty to conduct a competency hearing may arise at any time prior to judgment. (*People v. Rogers* (2006) 39 Cal.4th 826, 847.) An incompetent defendant is incapable of entering a knowledgeable plea. (*People v. Hofferber* (1977) 70 Cal.App.3d 265, 269.) A plea entered at a time defendant was incompetent must be reversed. (*People v. Gallantier* (1941) 47 Cal.App.2d 148, 150.)

b. *Defendant Demonstrates No Error in the Trial Court's Finding That He was Competent at the Time He Entered His Plea*

Generally, "[a] decision to deny a motion to withdraw a guilty plea "'rests in the sound discretion of the trial court'" and is final unless the defendant can show a clear abuse of that discretion. [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) This is the appropriate standard of review even where the defendant argues that his plea was not knowingly and intelligently made. (*Ibid*.) We find no support for defendant's claim that this court should review de novo the denial of his motion to vacate his plea. (See *People v. Wharton* (1991) 53 Cal.3d 522, 585 [applying abuse of discretion standard to motion to withdraw plea where defendant argued he was incompetent at time plea entered].) However, even under the de novo standard of review, the trial court properly denied defendant's motion to withdraw his no contest plea.

As the United States Supreme Court has observed, "defense counsel will often have the best-informed view of the defendant's ability to participate in his defense." (*Medina v. California, supra*, 505 U.S. at p. 450.) Ms. McCoy's testimony established that defendant engaged in meaningful discussions with his counsel when he entered his plea. As Ms. McCoy acknowledged, she would readily have proffered evidence of defendant's incompetence -- had any existed --

in order to avoid the imposition of a mandatory minimum sentence. In short, Ms. McCoy's testimony strongly supported the trial court's finding of competency.

Dr. Sharma's testimony also supported a finding of competency. Although he opined that defendant was incompetent at the time he entered his plea, Dr. Sharma made clear that he would reverse that opinion in the face of evidence that defendant had engaged in meaningful discussions with his counsel at the time of the plea. As described, Ms. McCoy provided such evidence. Moreover, when Dr. Sharma saw defendant in December 2001, defendant was "almost like a dummy," and Dr. Sharma could not interact with him. Defendant did not know his own name. There was no evidence of any of these symptoms on June 18, 2001, when defendant pled guilty. While defendant did not give lengthy answers in response to questions about waiving his rights, he answered each question appropriately and had several conversations with his attorney. There was no evidence that defendant reacted "like a dummy" and other than his use of a wheelchair, there was no evidence of any disability.[4]

The trial court noted that nothing in defendant's behavior at the plea hearing over which the court presided indicated that defendant was incompetent. Prior to his plea, defendant executed a written waiver identifying the rights he was prepared to give up. Defendant then orally waived several rights, during which time he repeatedly conferred with his counsel. Although defendant promised to establish that he did not sign the written waiver or understand its contents, he offered no evidence on that subject.

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[4] Even if defendant's mother's testimony contradicted that of Ms. McCoy's, substantial evidence supported the trial court's determination. (See *People v. Leonard* (2007) 40 Cal.4th 1370, 1393 [substantial evidence supported competency determination based on physician's testimony and report despite testimony of defendant's mother that defendant heard voices].)

Finally, there is nothing to support defendant's claim that the court improperly required him to prove his incompetency by clear and convincing evidence. Section 1369 states, "[i]t shall be presumed that the defendant is mentally competent unless it is proved by a *preponderance of the evidence* that the defendant is mentally incompetent." (§1369, subd. (f), italics added.) Additionally, "a presumption that fixes the weight of the burden of proof, at a trial [on a defendant's competency], at clear and convincing evidence is violative of the Fourteenth Amendment's due process clause." (*People v. Rells, supra*, 22 Cal.4th at p. 870, citing *Cooper v. Oklahoma, supra*, 517 U.S. at pp. 354-369.) Nothing in the record suggests the trial court applied an incorrect burden. (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 [trial court is presumed to know and apply the correct statutory and case law].)[5] Moreover, defendant did not show by a preponderance of the evidence that he was incompetent at the time he entered his plea.

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[5] In *People v. Wharton, supra*, 53 Cal.3d at page 585, decided prior to *Cooper v. Oklahoma, supra*, 517 U.S. 348, the court implied that during a motion to withdraw a guilty plea, a defendant has the burden of showing good cause by clear and convincing evidence even in the context of a claim of incompetence at the time the plea was entered. The court cited *People v. Cruz* (1974) 12 Cal. 3d 562, 566-567, for that proposition, but *Cruz* did not involve a claim that the defendant was incompetent at the time he entered his plea. Additionally, the *Wharton* court specifically noted that it rejected the defendant's due process claim because it was not supported by argument. (*People v. Wharton, supra*, 53 Cal.3d at p. 585.) Authority subsequent to *Wharton* demonstrates that in order to comport with due process, the evidentiary burden placed on a defendant seeking to demonstrate incompetence must be proof by a preponderance of the evidence. (*Cooper v. Oklahoma, supra*, 517 U.S. at p. 369.)

2. *Defendant Does Not Show His Plea Should be Set Aside Because He was Misadvised Regarding His Eligibility for Probation*

At the beginning of the June 18, 2001 hearing and prior to defendant's no contest plea, the court stated, "It's my understanding, Mr. Wesley wishes to enter an open plea to the court . . . . I understand this is an allegation of [section] 211 with a gun use. Probation . . . technically, it's eligible but not reasonably likely at all. So it's a question of what level of state prison . . . ." Subsequently, the prosecutor advised defendant that "[t]his is a prison case" and the maximum potential sentence was 15 years.

There is no dispute that the trial court erred in stating that defendant was "technically . . . eligible" for probation if he admitted to a section 12022.53 gun enhancement. (§ 12022.53, subd. (g) [prohibiting a court from granting probation where section 12022.53 allegation found true].) A defendant must be advised of his ineligibility for probation if that is a consequence of his plea. (*People v. Caban* (1983) 148 Cal.App.3d 706, 711.) However, the failure to so advise a defendant requires reversal only if it was prejudicial. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023; *Caban, supra*, at pp. 711-712.) On this record, defendant could demonstrate prejudice only by showing it was reasonably probable that he would not have entered his plea and admitted the gun use allegation had he been properly advised. (*Walker, supra*, 54 Cal.3d at p. 1023; *Caban, supra*, at pp. 711-712.)

Initially, we note that defendant has forfeited this contention by failing to raise it at or before sentencing. (*People v. Walker, supra,* 54 Cal.3d at p. 1023.) Although that rule does not apply where the defendant had no reason to question the accuracy of the trial court's statement (*In re Moser* (1993) 6 Cal.4th 342, 352-353, fn. 8), that exception is inapplicable here. At sentencing, defendant had every reason to challenge the imposition of a 12-year prison sentence, had such sentence been contrary to an earlier advisement by the trial court. The delay in sentencing

and the substitution of counsel did not alter defendant's incentive to object to the sentence.

Moreover, on the merits, defendant has not demonstrated prejudice. First, the court informed defendant that probation was "not reasonably likely at all." Therefore, although the court incorrectly informed defendant he was "technically" eligible for probation, the court also warned appellant that such an outcome was *not* reasonably likely. In addition to the court's statement, the prosecutor informed defendant unequivocally that he *would* be sentenced to prison, and defendant acknowledged this on his written waiver. Specifically, defendant initialed a provision stating, "My lawyer has told me that if I plead guilty to [robbery with a section 12022.53 enhancement] . . . the court will sentence me as follows: [¶] State prison for the term prescribed by law, which term is a maximum of 15 years imprisonment in the penitentiary. I waive my right to make application for probation and request immediate sentence." (Italics omitted.) Based on these circumstances, defendant could not reasonably have believed he would be sentenced to probation. Because he cannot show that his plea and admission were the result of an incorrect advisement, he cannot demonstrate prejudice.[6]

3. *Presentence Conduct Credits*

The court awarded defendant 75 days of conduct credits and 2,386 total presentence credits. The parties agree defendant was entitled to additional conduct credits because the trial court's calculation did not include time spent in a state hospital for evaluation or after he was found competent. (*People v. Cramp* (1984) 162 Cal.App.3d 632, 633 [defendant confined in state hospital for evaluation is

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[6] For the same reason defendant also cannot show he received ineffective assistance of counsel. (*People v. Boyette* (2002) 29 Cal.4th 381, 423 [prejudice necessary element of a claim of ineffective assistance of counsel].)

entitled to presentence conduct credit]; *People v. Bryant* (2009) 174 Cal.App.4th 175, 177 [equal protection requires a defendant be given conduct credits for time he would have earned if returned to county jail following issuance of a timely restoration of certification].) Where "uncontradicted evidence demonstrates the accused's competency was unquestionably regained as of a date certain . . . the defendant is entitled to . . . conduct credits even though the . . . certification [of competency] has not been mailed to the trial court." (*Bryant*, at p. 184.)

The record indicates that defendant was in custody for 2,311 days. Defendant was in Patton for treatment for a total of 370 days.[7] Defendant was not entitled to credit for the days he was receiving treatment. (*People v. Waterman* (1986) 42 Cal.3d 565, 571.) However, he was entitled to conduct credit for the remainder of his time, which totaled 1,941 days (2,311 minus 370) and included time spent in jail and in Patton for evaluation and after he was found competent. Defendant's conduct credits are calculated by taking 15 percent of 1,941 days because robbery is a violent crime. (§ 2933.1, subd. (a) [limiting conduct credit for a violent crime to 15 percent].) Defendant should have been awarded 291 days of conduct credit instead of 75 days.[8]

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[7] Defendant was admitted August 12, 2002 and certified as competent October 18, 2002, for a total of 67 days of treatment. Defendant was admitted September 8, 2003, and certified as competent October 7, 2003, for a total of 29 days of treatment. Defendant was admitted July 12, 2004, and certified as competent April 12, 2005 for a total of 274 days of treatment.

[8] Respondent argues the case should be remanded to the trial court for additional factfinding. However, respondent identifies no factual issues that require resolution. We conclude the record suffices to determine defendant's conduct credits in this court. This case is distinguishable from *People v. Callahan* (2006) 144 Cal.App.4th 678, 687, where the court found conduct credit was improperly awarded for time defendant spent in state hospital while competent

DISPOSITION

The judgment is modified to include a total of 291 conduct credits and a total presentence credit of 2,602 days. In all other respects, the judgment is affirmed. The trial court is directed to correct the abstract of judgment and the sentencing minute order and to send a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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because in that case the confinement in the state hospital was based on an insanity commitment for a crime prior to the charged offense.